IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 183 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

DAHYABHAI SOLANKI

Versus

STATE OF GUJARAT & 3

Appearance:

1. Criminal Revision Application No. 183 of 1992

MR HARESH J TRIVEDI for Petitioner No. 1

MR IM PANDYA APP for Respondent No. 1

MR KS JHAVERI for Respondent No. 2

MR HM DHRUVA for Respondent No. 3-4

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 28/08/2002

C.A.V. JUDGEMENT

1. By this Revision Application under Section 397 of the Code of Criminal Procedure (for short 'the Cr.P.C.'), the Law Officer of the Gujarat Pollution Control Board ('the GPCB' for short) has prayed to set aside the judgment and order of the learned Chief Metropolitan Magistrate, Ahmedabad in Criminal Case No.2487 of 1988 whereunder the accused persons (the respondents No. 2 to 4 herein) are discharged under Section 245 of the Cr.P.C.; even before framing of the charge.

2. The Law Officer of the GPCB filed a complaint against the accused persons ('the respondents' for short) on the basis that the accused, a company headed and run by its two directors, were manufacturing approximately 15 tons of H.Acid per month and discharging, from their factory, the trade effluents, in the form of 4.50 lac litres of water per month, without any treatment at all. They had applied for consent under the Water (Prevention and Control of Pollution) Act, 1974 ('the Act' for short) which was rejected by order dated 31.7.1987 in which conditions regarding discharge of effluent were also imposed under the provisions of Section 25 of the Act. Thereafter, on 19.1.1988, the premises of the factory of the respondents was inspected and, in presence of the Manager, sample of the trade effluent was taken. Upon analysis of the sample, the respondents were alleged to have discharged the trade effluent without any treatment and alleged to have violated the provisions of Sections 25 and 26 of the Act and thereby committed the offences punishable with imprisonment for a term not less than one year and six months and which may extend to six years and with fine under Section 44 of the Act.

2.1 The case being a warrant case instituted by a complaint, the Court recorded the evidence produced in support of the prosecution and, after hearing the parties, the impugned judgment and order dated 10.1.1992 at Exh.22 was made. After recording the reasons, it was concluded that the prosecution had not complied with the provisions of Sections 21 (5) and 22 (2) of the Act and the requirements of Indian Standard Method of Sampling" were also held to have been violated. It was further held that the prosecution had also, while taking samples, not complied with the requirements of the Cr.P.C. as required under the provisions of Section 23 of the Act insofar as no panch or independent witness was found to have been present at the time of inspection of the plant and seizure of the sample. Thus, the respondents were discharged upon the finding that the prosecution had failed to establish even a prima facie case against them.

3. In order to appreciate the import of the relevant provisions of Sections 21, 22 and 23 of the Act and to apply the same in the facts of the present case, it would be advantageous to reproduce the relevant parts thereof as under:

"21. Power to take samples of effluents and procedure to be followed in connection therewith:

(1) A State Board or any officer empowered by it in this behalf shall have power to take for the purpose of analysis samples of water from any stream or well or samples of any sewage or trade effluent which is passing from any plant or vessel or from or over any place into any such stream or well.

(2) The result of any analysis of a sample of any sewage or trade effluent taken under sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of sub-sections (3), (4) and (5) are complied with.

(3) Subject to the provisions of sub-sections (4) and (5), when a sample (composite or otherwise as may be warranted by the process used) of any sewage or trade effluent is taken for analysis under sub-section (1), the person taking the sample shall-

(a) serve on the person in charge of, or having control over, the plant or vessel or in occupation of the place (which person is hereinafter referred to as the occupier) or any agent of such occupier, a notice, then and there in such form as may be prescribed of his intention to have it so analysed;

(b) in the presence of the occupier or his agent, divide the sample into two parts;

(c) cause each part to be placed in a container which shall be marked and sealed and shall also be signed both by the person taking

the sample and the occupier or his agent;

(d) send one container forthwith,-

(i) in a case where such sample is taken from any area situated in a Union Territory, to the laboratory established or recognised by the Central Board under Sec.16; and

(ii) in any other case, to the laboratory established or recognised by the State Board under Sec.17;

(e) on the request of the occupier or his agent, send the second container-

(i) in a case when such sample is taken from any area situated in a Union Territory, to the laboratory established or specified under sub-section (1) of Sec.51; and

(ii) in any other case, to the laboratory established or specified under subsection (1) of Sec.52.

(4) When a sample of any sewage or trade effluent is taken for analysis under sub-section (1) and the person taking the sample serves on the occupier or his agent, a notice under Cl.(a) of sub-section (3) and the occupier or his agent wilfully absents himself then,-

(a) the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the

laboratory referred to in sub-clause (i) or sub-clause (ii), as the case may be, of Cl.(e) of sub-section (3) and such person shall inform the Government Analyst appointed under sub-section (1) or sub-section (2), as the case may be of Sec.53, in writing about the wilful absence of the occupier or his agent; and

(b) the cost incurred in getting such sample analysed shall be payable by the occupier or his agent and in case of default of such payment, the same shall be recoverable from the occupier or his agent, as the case may be, as an arrear of land revenue or of public demand.

(5) When a sample of any sewage or trade effluent is taken for analysis under sub-section (1) and the person taking the sample serves on the occupier or his agent a notice under Cl.(a) of sub-section (3) and the occupier or his agent who is present at the time of taking the sample does not make a request for dividing the sample into two parts as provided in Cl. (b) of sub-section (3), then, the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the laboratory referred to in sub-clause (), or sub-clause (ii), as the case may be, of Cl. (d) of sub-section (3)."

"S.22 Reports of the result of analysis on samples taken under Sec.21:-

(1) Where a sample of any sewage or trade effluent has been sent for analysis to the laboratory established or recognised by the Central Board or, as the case may be, the State Board, the concerned Board analyst appointed under sub-section (3) of Sec.53 shall analyse the sample and

submit a report in the prescribed form of the result of such analysis in triplicate to the Central Board or the State board, as the case may be.

(2) On receipt of the report under subsection (1), one copy of the report shall be sent by the Central Board or the State Board, as the case may be, to the occupier or his agent referred to in Sec.21, another copy shall be preserved for production before the Court in case any legal proceedings are taken against him and the other copy shall be kept by the concerned Board.

(3) xxx xxx xxx
(4) xxx xxx xxx
(5) xxx xxx xxx "

"S.23 Power of entry and inspection:-

(1) Subject to the provisions of this Section, any person empowered by a State Board in this behalf shall have a right at any time to enter, with such assistance as he considers necessary, any place-

(a) for the purpose of performing any of the functions of the Board entrusted to him;

(b) for the purpose of determining whether and if so in what manner, any such functions are to be performed or whether any provisions of this Act or the rules made thereunder or any notice, order, direction or authorisation served, made, given, or granted under this Act is being or has been complied with;

(c) for the purpose of examining any plant, record, register, document or any other material object or for conducting a search of any place in which he has reason to believe that an offence under this Act or the rules made thereunder has been or is being or is about to be committed and

for seizing any such plant, record, register, document or other material object, if he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act or the rules made thereunder:

Provided that the right to enter under this sub-section for the inspection of a well shall be exercised only at reasonable hours in a case where such well is situated in any premises used for residential purposes and the water thereof is used exclusively for domestic purposes.

(2) The provisions of the Code of Criminal Procedure Code, 1973 92 of 1974) or, in relation to the State of Jammu and Kashmir, the provision of any corresponding law in force in that State, shall, so far as may be, apply to any search or seizure under this section as they apply to any search or seizure made under the authority of a warrant issued under Sec.94 of the said Code, or, as the case may be, under the corresponding provisions of the said law.

Explanation: For the purposes of this section, "place" includes vessel."

4. There is no dispute about the fact that before taking of the sample, "Notice of entry and inspection" (Exh.11) was served upon Shri Naresh Chandak, Production Manager of the respondents, by Shri S.H.Vegda (AEE) of the GPCB to intimate that they were entering the factory at 12 a.m. on 19.1.1988 with the assistance of Shri.D.L.Bhatt and Smt. V.R.Bhatt, other officers of the GPCB. That notice at the outset declared that the officer giving the notice was authorised to enter into any place for the purpose of ascertaining whether any provisions of the Act or the Rules made thereunder or any notice, order, direction or authorisation served, made, given or granted under the Act was being complied as also to examine any plant, record, register, document or any other material object or to conduct search or for seizing any plant, record, register, document or material object

if he had reasons to believe that it may furnish evidence of the commission of offence punishable under the Act or the Rules made thereunder. Another notice signed by Smt.V.R.Bhatt (SSA of the GPCB) as also Shri Chandak was at Exh.12 and that "Notice of intention for collection and analysis of sample" in Form-A under Rule 17 appears to have been specifically served for the purpose of compliance with Section 21 (3) (a) of the Act. There is also no dispute about the fact that Shri Chandak had in writing (Exh.13) stated with his signature and stamp of the respondent Company that they were not interested in getting the samples analysed by Government Analyst.

4.1 The contention that appears to have appealed to the trial Court is that there was no request by the occupier not to divide the sample into two parts which is a mandatory statutory requirement of Clause (b) of sub-section (3) of Section 21. However, the opening words of sub-section (3) make it abundantly clear that the requirements of that sub-section are subject to sub-sections (4) and (5) and, therefore, when the occupier does not make a request for dividing the samples into two parts only the provision of sub-section (5) have to be complied. In that also, the requirement of sending the sample forthwith, after marking, sealing and signing as prescribed, has to be interpreted and applied in such a reasonable manner as may subserve the purpose of the provision and cannot be construed too literally to mean that the sample must straightaway go to the laboratory for analysis. It is held by this Court in DAHYABHAI K. SOLANKI v. M/S. KASHIRAM TEXTILES MILLS (PVT) LTD. & ORS. [1994 (2) GLR 1166] that, for the purpose of Section 21 (2) of the Act, there must be 'substantial compliance' of the provisions of sub-sections (3), (4) and (5) of Section 21 of the Act. In that view of the matter, the interpretation and reasoning adopted by the trial Court to hold that the provisions of sub-section (5) of Section 21 were violated are erroneous and, therefore, that conclusion has to be set aside.

5. As for the violation of the provisions of sub-section (2) of section 22, as contended on behalf of the respondents on the basis that the report of the analysis of the sample was sent to the Company and not to its directors, it can be seen that the provision requires sending of a copy of the report to the occupier or his agent referred to in Section 21 of the Act. The word "occupier" is, by the special provisions of sub-section (3) clause (a) of Section 21, given a wider meaning to cover the person in charge of, or having control over the plant or vessel, or the person in occupation of the

place. Whereas sub-section (3) of section 21 requires "service of notice", the provisions of sub-section (2) of section 22 only makes it mandatory to "send" a copy of the analysis report. Therefore, the mandatory requirements of "serving upon" and "sending to" the "occupier" as they occur in sub-section (3) of Section 21 and sub-section (2) of Section 22 must be differentiated. In case of notice under Section 21 (3) (a), the service was required to be effected, then and there, upon the "occupier", whereas the analysis report was, under sub-section (2) of section 22, required to be sent to the "occupier" and, therefore, if such report is sent to the same address and received thereat, it must be presumed that it was served to the occupier even though the name of the person upon whom the earlier notice under section 21 (3) (a) was served was not mentioned by name or designation. The words "occupier" or "any agent of such occupier" are wide enough to cover the person who would receive at the same address the analysis report under section 22 (2). In the facts of the present case, the notice at Exh.12 was addressed to the Company and the copy of the analysis report was sent with a covering letter (Exh.20) which was also addressed to the Company at the same address. Therefore, it is held that sending of the analysis report under sub-section (2) of section 22 at the same address as found in the notice under sub-section (3) (a) of section 21 would be sufficient compliance of the provisions of sub-section (2) of section 22 of the Act.

6. As regards violation of Section 23 of the Act, it was vehemently argued on behalf of the respondents that while entering their premises and seizing any material for the purpose of performing any of the functions of the Board (GPCB) entrusted to the officers concerned, it was mandatory to comply with the provisions of the Cr.P.C. regarding search and seizure; more particularly, the provisions of Section 100. It was, on that basis, submitted in support of the impugned judgment that the trial Court was right in holding that in absence of two or more independent and respectable witnesses and the list of the things seized being prepared and signed by such witnesses, the whole procedure of collection of sample was vitiated and illegal. Amplifying this contention, it was also argued that such procedural safeguard was indeed necessary and very important to protect the industries and private individuals from malicious prosecution. It was also argued that the provisions of Section 23 applied whenever any person empowered by the State Board exercises his right to enter any place for the purpose of performing any of the

functions of the Board entrusted to him. These arguments, though looking attractive in the first blush, require closer scrutiny.

6.1 Sub-section (2) of section 23 by which the safeguards provided in the Cr.P.C. in case of search and seizure are introduced makes it expressly clear that those provisions will apply to any search or seizure "under this Section", i.e. under Section 23. As seen earlier, the power to take samples of effluent is provided for separately under Section 21 and the procedure prescribed thereunder has nothing to do with search or seizure under Section 23. The provisions of Sections 21 and 23 are operating in altogether different, distinct and separate areas. Section 21 provides a self-contained code for the taking of samples and the procedure to be followed in connection therewith. There is nothing in the Act to suggest, either expressly or by necessary implication, that the power to take samples under Section 21 and the procedure prescribed therefor is subject to the provisions of Section 23. Instead, according to the scheme of the Act and the express provisions of sub-section (1) of Section 21, samples of any sewage or trade effluent can be taken for the purpose of analysis while it is passing from any plant or vessel or while it is passing from or over any place into any stream or well. In order to make the analysis report of such sewage or trade effluent admissible in evidence, the procedure prescribed under sub-sections (3), (4) and (5) of Section 21 have to be complied with; and the provisions of sub-sections (3), (4) and (5), in turn, provide for service of notice upon the occupier at the time of taking sample of any sewage or trade effluent for the purpose of analysis and the further procedure to be followed. The whole process of taking sample under Section 21 may be carried out inside or outside a plant or vessel and, therefore, the question of entering in a plant or premises may not arise at all. Secondly, the distinct purposes of entry and inspection under the provisions of Section 23 are: performing the functions of the Board; determining whether the provisions of the Act or the Rules made thereunder or any notice, order, direction etc. are complied with or not; and examining any plant, record, register, document or any other material object where commission of an offence under the Act is suspected and to seize some such object as is likely to furnish evidence of commission of an offence punishable under the Act.

6.2 Broadly speaking, the provisions of section 21 are directed towards discovering water pollution, whereas

the provisions of section 23 are aimed at facilitating detection of other offences under the Act. The prime object of the Act as declared in the Preamble and embodied in the provisions of Section 24 is to provide for prevention and control of water pollution and the maintaining and/or restoring of wholesomeness of water. Therefore, provisions are made to prevent direct or indirect entry into any stream, swell, sewer or even on land of any poisonous, noxious or polluting water. The enforcement agency under the Act may have to, for the aforesaid purpose, take samples from any stream or well and entry into and inspection of any place may or may not be required. Similarly, entry, inspection or seizure of any article may be required for the purpose of detection of any offence under the Act or for the purpose of performing any of the functions of the Pollution Control Board and the necessity of taking or collecting samples may not necessarily be involved. It appears that, therefore, separate and distinct provisions are made in the Act and separate forms of notices for entry or inspection on the one hand and of intention to collect samples for analysis are prescribed and in fact served in the present case. Therefore, by no stretch it can be contended that the taking of samples was also required to be in compliance with the provisions of Section 23 even though taking of samples might have required entry of the authorised officers in the premises of the plant. Accordingly, discharge of the respondents on the ground of violation of Section 23 in the matter of taking samples has to be set aside.

7. The other ground which also appealed to the trial Court was as regards the responsibility of the respondents No.3 and 4 as the directors of the respondent No.2 Company. The factual aspect of the issue and the evidence thereon are not discussed in detail for two reasons, namely, that further evidence in that regard may be led on either side and the case against the company would not be affected by even absence of any evidence regarding responsibility of the directors. The implication of the observations of this Court in AZIM HASHAN PREMJI v. STATE OF GUJARAT [2000 (2) GLH 788, particularly paragraph 5] and its application in the facts of this case, as suggested and canvassed for the petitioner are, therefore, not discussed as such exercise would be unnecessary and premature in view of the statements and order that follows.

8. In fact, after the matter being argued at length after pendency of the case in this Court for about a decade, the learned counsel for the respondents fairly

conceded that the impugned order having been made at the preliminary stage even before framing of the charge, the matter may be remanded to the trial Court for hearing and disposal on the basis also of such other and further evidence as the parties may lead in accordance with the provisions of Section 246 of the Cr.P.C. The learned counsel for the petitioner also submitted that, after cross-examination and re-examination (if any) of the witnesses already examined for the prosecution, if need be, the petitioner may lead further evidence for the prosecution with liberty to the respondents to produce their evidence in defence in accordance with the provisions of Section 247 of the Cr.P.C. Therefore, at the request of the parties, the other issues and minor details of the evidence thereon are not discussed and dealt with at this stage.

9. In the result, for the reasons and in the facts discussed hereinabove, the Revision Application is allowed and setting aside the impugned judgment and order at Exh.22 in Criminal Case No.2487 of 1988, the Chief Metropolitan Magistrate, Ahmedabad is directed to frame the charge and proceed further with the trial of the aforesaid case in accordance with law and as expeditiously as practicable, from the stage from where the accused were discharged. Rule is accordingly made absolute with order to the respondents to pay to the petitioner, by way of costs, Rs.5,000/-. It is, however, clarified that the facts so far on record are discussed herein for deciding the legal issues involved in the revision and the trial Court shall not be influenced by the observations on facts in deciding the issues on the basis of the whole evidence before it in accordance with law. The record and proceeding of the trial Court shall be returned forthwith.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)